UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
Plaintiff,	)	No. 3:12-CV-519
vs.	)	
REX VENTURES GROUP, LLC, ET AL,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE GRAHAM C. MULLEN
UNITED STATES DISTRICT COURT JUDGE
MAY 3, 2017

APPEARANCES:

On Behalf of the Receiver for Rex Ventures Group:

IRVING M. BRENNER, ESQ.
KENNETH D. BELL, ESQ.
MATTHEW E. ORSO, ESQ.
McGuire Woods, LLP
201 North Tryon Street, Suite 3000
Charlotte, North Carolina 28202

On Behalf of Victoriabank:

KIRAN H. MEHTA, ESQ.
Troutman Sanders, LLP
301 South College Street, Suite 3400
Charlotte, North Carolina 28202

KATHLEEN CAMPBELL, ESQ.
LINDSEY B. MANN, ESQ.
Troutman Sanders, LLP
600 Peachtree Street NE, Suite 5200
Atlanta, Georgia 30308

Cheryl A. Nuccio, RMR-CRR
Official Court Reporter
United States District Court
Charlotte, North Carolina

APPEARANCES:

On Behalf of Payment World:

C. KIEL GARELLA, ESQ.
Garella Law, PC
409 East Boulevard
Charlotte, North Carolina 28203

P R O C E E D I N G S

WEDNESDAY MORNING, MAY 3, 2017

(Court called to order at 1:55 p.m.)

THE COURT: All right. Good afternoon.

ALL COUNSEL: Good afternoon, Your Honor.

THE COURT: We're here after giving the receiver some extra time to do some more discovery and attempt to evaluate what's going on in California. And we're here on the motion of Victoriabank to dismiss this matter.

Mr. Mehta, do you plan to argue today?

MR. MEHTA: Yes, sir.

THE COURT: All right. And you will be, Mr. Brenner?

MR. BRENNER: Yes, Your Honor.

THE COURT: All right. How much time do you think you folks need today?

MR. MEHTA: I wouldn think for our side, maybe a half hour or so.

THE COURT: I was figuring about a half an hour apiece.

Does that sound about right?

MR. BRENNER: That's fine.

THE COURT: All right, sir. You may proceed.

MR. MEHTA: Thank you, Your Honor.

And may it please the Court, of course, I'm Kiran

Mehta. I'm here appearing specially for Victoriabank since Victoriabank doesn't think it ought to be here at all. And with me are a couple of my colleagues, Lindsey Mann and Kathleen Campbell, who have entered pro hac appearances in this case as well.

Victoriabank is, as you know, Your Honor, a Moldovan bank. It was created under and governed by the laws, rules, regulations of the Republic of Moldova. This Court's writ doesn't run to Moldova. This is, I think, a fact; but a fact that the receiver has so far refused to admit. Rather, the receiver insists that Victoriabank be treated just like any other domestic financial institution; and he asserts that just like any other domestic financial institution, this Court's 2012 Freeze Order freezing the assets preventing their movement and transfer of the underlying receiver -- of the underlying defendants in the receivership action, they say that it does indeed run to Moldova and does indeed bind a Moldovan bank without the need to domesticate that order in Moldova and make it effective under Moldovan law.

And further, in this particular proceeding, which is a contempt proceeding, the receiver seeks to elicit the coercive power of this Court through its contempt sanction to effect -- give effect to that order; and, in fact, has already used the coercive power of this Court to seize $13 million in Victoriabank's correspondent bank account at Bank of New York

Mellon without notice, without opportunity to be heard, without the service of any process, and without having established that this Court in fact has jurisdiction to do so. And Victoriabank challenges by its motion the notion that is advanced by the receiver that the bank is subject to the Court's power and subject to the contempt sanction that they seek to bring to bear.

And Victoriabank's motion is really premised on three concepts, any one of which, if you find in Victoriabank's favor, will -- should result in the grant of its motion.

One is basic service of process. The receiver has not served any paper in this entire matter upon Victoriabank in accordance with either Moldovan law or even the Hague Convention. They have used the mails and email to send papers to Moldova and think that that is sufficient under the rules governing this procedure. The matter has been going on over a year and there is still no service whatsoever through Moldovan law or through the Hague Convention.

It's axiomatic that in order for this Court to exercise any kind of power and authority over somebody that is before it, that that party needs to be before it in a formal sense and Victoriabank is not because it has never been served with proper service. Proper service is the foundation to bring parties within your power. No service, motion should be

granted.

The second concept is a traditional minimum contacts personal jurisdiction concept. I'll get to that in a moment.

The third deals with principles of international comity, and they are expressed most fully by the Ninth Circuit in the *Reebok* case which we discussed, of course, at length back in June and has been discussed at greater length in the papers, supplemental papers that have been more recently filed. And this is actually where we left off the hearing last June with Your Honor observing that *Reebok* was, quote, looking pretty heavy, close quote, against the receiver, and with good reason. That observation is made with good reason because *Reebok* is really on all fours with this case.

Reebok involved a foreign bank created by and subject to the laws of a foreign country, in that case Luxembourg, and an injunctive order by a federal district court which the bank not only ignored but, according to the district court and its actual factual findings, actively colluded with the enjoined party in what the district court said was a sham lawsuit designed to evade the injunction.

Nevertheless, the Ninth Circuit held that the district court did not have jurisdiction against the foreign bank for the same reason that you, with all due respect, do not have jurisdiction to enforce the 2012 Freeze Order against Victoriabank. Just as your writ does not run to Moldova, the

Ninth Circuit held that the Southern District of California's writ did not run to Luxembourg, particularly when the laws of Luxembourg would not permit the bank to follow the American court's injunction. And we have exactly the same situation here.

In order for the 2012 Freeze Order to be effective against a Moldovan national, it would have to be domesticated in Moldova and given effect by a Moldovan court. The receiver did not do that back in 2012 and has never done it in all the time that has passed since 2012. And without domestication of that Freeze Order through the Moldovan legal process, had Victoriabank given that order effect, it would have violated Moldovan law which prevents suspension of a bank account absent an order from a state authority, that is a Moldovan state authority.

So to paraphrase the Ninth Circuit, and this is at page 1394 of the *Reebok* opinion, though I'm substituting some names, a national of a foreign country, Victoriabank, followed the law of its own country, Moldova, when it did acts within that country. It did that rather than following an order from a court of another country, the United States, which had no legal effect in Moldova. It is pellucid -- I had to look up that word. It's a $20 word for clear. It is pellucid that Victoriabank has simply behaved as any rational, law-abiding person would. It has obeyed the law. It has obeyed the only

law applicable to it, the law of its sovereign.

Now, the plaintiff in the *Reebok* case, just like the receiver here, relied on a case out of the Fifth Circuit called *Waffenshmidt versus McKay*, and the case is cited again at length by both sides in the papers, in which the Court, this is the Fifth Circuit, held that a federal district court has the power to enforce an injunction even as against nonparties who otherwise would not be subject to personal jurisdiction in that court.

But as the Ninth Circuit observed, *Waffenshmidt* involved a purely domestic matter involving U.S. citizens operating within the United States. The Court held that *Waffenshmidt's* reasoning breaks down when applied to foreign nationals and the district court reaches out to apply its order not made effective in that foreign country to those foreign nationals acting within their own country.

And this is the crucial factor that really distinguishes all of the cases that the receiver relies upon except for one, and we'll get to that in a moment. Those cases do not involve international nonparties. They only involve U.S. citizens.

And the one exception is the *Abi Jaoudi* case from the Eastern District of Pennsylvania which, again, is cited and discussed at some length in the papers. But that one is very readily distinguishable because foundationally in that

case it was the foreign entity that sued in the Eastern District of Pennsylvania, therefore subjecting itself to the jurisdiction of the Eastern District of Pennsylvania. And when that Court issued an injunction in connection with that lawsuit, it sought to evade that jurisdiction through foreign nonparties and the Court said, no, you can't do that. You can't try to evade what you've already sought affirmatively to invoke. Of course, that's not at all the situation here.

Now, the receiver tries to get around *Reebok* in a number of ways, but none of them really work.

At last June's hearing, the receiver insinuated based on the declaration of Roman Balanko of the U.S. Payment World entity that Victoriabank was in cahoots with the bad actors who engineered the transfer of funds out of the bank. And the Court, in fact, told him, as you mentioned earlier this afternoon, to go ahead and do some discovery to back up and substantiate those accusations.

But it turns out that the so-called evidence that the receiver relies on here is just plain old hearsay, rank hearsay. Statements by other people not before us, not in any way under oath, not anything of that nature, relayed to Mr. Balanko which he then relayed. And of course, they're coming from Mr. Balanko who the receiver clearly does not believe and, frankly, thinks is a liar and is one of the people who did, according to the receiver, engineer the making

off of the funds that had been in Victoriabank. And there is absolutely no evidence, none whatsoever that Victoriabank has any connection to this alleged scheme.

So the receiver doesn't even mention what he said back in June in his discussion of the *Reebok* case in his supplemental brief and papers. Rather, he says the law in Luxembourg is more clear than the law in Moldova on this point, but that -- really he can't back that up either. I mean, there's an affidavit from an expert in Moldovan law that is before you and in the record that clearly says that in order to make -- give effect to the 2012 Freeze Order in Moldova, it had to be registered and made effective by a Moldovan court, and it is undisputed that that has never happened.

And the expert goes on to say that suspension of a Moldovan bank account cannot occur without an order from a state authority. And again, as to the issues in this case, it is undisputed that no such ever -- no such order was ever sought by the receiver nor was one ever rendered by a Moldovan state authority. These are uncontradicted matters.

What the receiver says, and this appears to be the crux of his argument, is that Victoriabank is otherwise subject to this Court's jurisdiction as a result of its maintenance of a correspondent bank account at BNY Mellon and for that reason *Reebok* is distinguishable.

Now, in the first place, it's a bit of a stretch because there's nothing in the *Reebok* opinion that even addresses the Luxembourg bank's correspondent banking relationships. And it would have been highly unusual for it not to have correspondent banking relationships at all, particularly since the Court, you know, recounts in the *Reebok* opinion that the bank communicated with the defendant, the party which its supposed to have colluded to avoid the injunction, communicated with the defendant in California concerning its receipt of funds from the defendant, which suggests that the bank must have had some kind of a correspondent banking relationship in the U.S. in order to have those funds transferred from the U.S. to the bank in Luxembourg.

But it doesn't really matter, Your Honor, if you step back and consider what the receiver is arguing here. He is arguing that any foreign bank that maintains a correspondent account at a U.S. bank is subject to the contempt power of basically any federal district court in the United States. And because of the primacy of the U.S. dollar in international commerce, what that means is virtually every bank in the world is subject to the contempt power of any federal district court in the United States. And this is, I guess, a breathtakingly broad argument to make and it is completely unprecedented. There is no case, not one case that

holds what the receiver is arguing and supports that proposition.

So the receiver has not been able to negate *Reebok*'s holding and its analysis and that too, just like the failure to effect any service of process, means that the Court should grant Victoriabank's motion as an independent ground.

Which brings us to the traditional minimum contacts analysis which is the final ground upon which the motion is based, and here again the receiver fails.

To begin with, having obtained -- sought and obtained jurisdictional discovery, the standard the receiver must meet is to show jurisdiction by a preponderance of the evidence. There are many cases from this circuit that hold that. We've cited a few in the brief. There's another one actually from the Western District called *Marx Industries versus Chestnut Ridge*. The cite is 903 F.Supp 2d 358. It was decided by Judge Voorhees a couple of years ago. And the receiver has not met this preponderance of the evidence standard.

The receiver's argument is based on two steps.

First, he indicates that the New York courts would be able to exercise jurisdiction over Victoriabank because of the BNY Mellon account, which is, of course, in a bank in New York.

And the second step is that this Court can piggyback

on the New York court's exercise of jurisdiction through the interplay of Sections 754 and 1692 of Title 28, but neither step works.

First, as to New York, the New York long-arm statute is Section -- the relevant one is Section 302(a)(1) of the New York Civil Practice Code. And it allows New York courts to exercise jurisdiction with respect to a cause of action that arises from the transaction -- a cause of action that arises from a transaction of any business in a state.

And what the receiver has done here is he points to a single wire transfer of what he claims are receivership assets that flowed through Victoriabank's Bank of New York Mellon correspondent bank account, and that is the $15-1/2 million transaction on September 25th, 2012, which is, again, set out at some length and described at some length in the papers.

Now, the receiver spent a lot of time, money, and effort getting the information he needed out of the Bank of New York Mellon as part of his jurisdictional discovery, so it's important to get the facts of this transaction right. The transaction involved Payment World Moldova taking the money out of its Victoriabank account and sending it to Payment World Hong Kong at its account at the Tusar Bank which is a Russian bank.

Now, given the receiver's attitude towards these

various Payment World entities, what he's really saying -- what the receiver is really saying is that Payment World sent the money to itself and along the way that money flowed through -- because it's a dollar denominated transaction, it flowed through the correspondent bank account at BNY Mellon.

But all of the banks in this transaction, all of the banks in the chain, according to the declaration of the BNY Mellon representative who testified through declaration in this case, all of those banks are just conduits in the chain for how the money gets from point A in Moldova to point B in Russia. The customer, Payment World Moldova, or as the receiver would say, Payment World generally since he collapses all of those entities, the customer is the initiator and controller of those transactions.

Now, the general rule in terms of jurisdictional purposes for correspondent banking is set out in a case that we cite in our brief called *Daventree versus The Republic of Azerbaijan*. It's from the Southern District of New York. Essentially it says that merely maintaining a correspondent bank account to facilitate international financial transactions is insufficient under the minimum contacts analysis.

Now, the receiver points to a series of cases decided under the federal Anti-Terrorism Act that he says, in effect, modify this rule. But these cases, like the

Anti-Terrorism Act itself, require that the foreign bank must be complicit in the underlying cause of action; that is, that the foreign bank must use its correspondent banking relationship with a New York bank to, quote, knowingly support some terrorist activity.

And the necessity of the foreign bank's complicity in the underlying transaction was very recently made clear by the New York Court of Appeals -- which is the equivalent of the Supreme Court, it is the highest court in New York -- in a case called *Rushaid versus Pictet & Cie* which involved a Swiss bank that had allegedly participated in a scheme to embezzle funds from the plaintiff. And the Court held that the use of a New York correspondent bank in connection with that scheme was sufficient for minimum contacts.

This case, Your Honor, it's important to read it very carefully. It's a four to three decision, with the three dissenters essentially saying this upends our -- our general jurisprudence involving the general rule involving correspondent banking.

So crucially, the four-justice majority had two justices who wrote a separate concurring opinion. And that concurring opinion explained that they were not upending the general rule, and the explanation centered upon the complicity of the bank in the scheme. So that what is required if you're going to follow the exception to the rule, what would be

required is an actual complaint filed with all of the Rule 11 strictures that asserts and details that complicity. And of course, we don't have that here. The receiver hasn't filed any kind of complaint. He's not trying to directly go to the bank. He's really trying to go through the back door through a contempt proceeding to try to get to the bank in that way.

Now, we don't have any evidence anyway of any complicity by Victoriabank in any kind of scheme. Now, at the hearing last June, the receiver posited that Victoriabank being part of the overall worldwide Visa payment system meant that it was complicit. But again, he's backed off that proposition and doesn't even mention it in his supplemental briefing, which is a wise move because the Fourth Circuit's *Unspam* case, which we cited and discussed at some length in the supplemental brief, says that mere participation in the credit card payment system is -- that's in the ordinary course of business, you know, doesn't -- isn't enough to bring you over the minimum contacts hurdle.

And the other allegation of complicity, again, involves the alleged cross-ownership between Payment World and Victoriabank. And this is, of course, again, what Your Honor expressly told the receiver back in June to bring you substantiating evidence, and here we are eleven months later and he has not been able to bring you substantiating evidence. All he has is hearsay statements from Roman Balanko who he

plainly believes to be a liar.

So without complicity, the first step in that two-step process fails New York law, the New York law step. It fails.

But the second step fails too because the theory here is that this Court may through a combination of 28 U.S.C. Section 754 and Section 1692 exercise the jurisdiction that the New York courts have. But the only transaction identified by the receiver as affording him jurisdiction is the one on September 25th, 2012, and at that time the receiver had not filed any of his appointments with any of the courts in New York. That happened later that year in December. And it's the filing that gives jurisdiction in rem over receivership assets which then could translate into in personam jurisdiction through 754 and 1692. But in December when the receiver filed the 754 certification, there were no receivership assets in the Bank of New York in the correspondent bank account. So therefore, there's no in rem jurisdiction and there's no in personam jurisdiction either.

So ultimately, Your Honor, we've got no service of process to bring Victoriabank before you, we've got no minimum contacts, and no piggyback jurisdiction through 754 and 1692 of Title 28, and we have no way of getting around *Reebok*.

And the core of *Reebok* is that the reach of a federal district court's injunction runs as far as the

territory of the United States, but with respect to foreign nationals, runs no further than the territory of the United States.

And if you think about it in the reciprocal, that has to be true. We would not want as a sovereign nation, or in the case of North Carolina a sovereign state, we would not want to have our citizens subject to the injunctive orders of a Moldovan court until and unless those orders, the Moldovan court's injunctive orders were domesticated in the United States or in North Carolina specifically.

Your writ may not run -- does not run to Moldova, but Moldova is a sovereign nation. It has courts. It has laws. And domestication of your order has been possible in those courts ever since the order was issued, but it just never happened. And because it never happened, this Court doesn't have the jurisdiction to enforce through contempt the 2012 Freeze Order against Victoriabank.

And therefore, Your Honor, you should grant Victoriabank's motion. You should dismiss this proceeding and you should vacate the order that you signed a little over a year ago freezing 13 plus million dollars in the BNY Mellon correspondent bank account. And unless Your Honor has some questions, I will sit down.

THE COURT: I've read all of this, believe it or not.

MR. MEHTA: Well, I'm glad.

THE COURT: All right.

MR. MEHTA: No, we all appreciate the time that you've taken on this matter, Your Honor.

THE COURT: Mr. Brenner.

MR. BRENNER: Thank you, Your Honor.

Your Honor, we simply ask in this case that the Victoriabank not be treated specially in any way. We're asking the Court simply to treat them like anyone else that had actual notice of the Freeze Order and deliberately violated it. And that's -- that's what happened here. There's no question about actual notice. They had notice both in writing and they had both -- and they had oral notice directly to the president. So that's -- that's what we're asking to do.

Now, Your Honor, the -- this is a -- this is still a preliminary proceeding, and that is important both for the evidentiary standard and for the standard that the Court should use to decide this motion because we're only at a preliminary stage. And the reason we're at a preliminary stage, although this has dragged on certainly to our disappointment as well, is that we have not gotten the discovery that we need from Victoriabank. This is not -- I mean, they have said, well, we're not subject to jurisdiction so we're not going to provide discovery. That's -- the Court

has permitted that. That's fine. But that puts us in a place where it's a preliminary proceeding and, like a motion to dismiss, the facts and all inferences from the facts are taken in favor of the receiver, in favor of the moving party.

And this -- so that makes the complaints about hearsay incorrect. In a motion to dismiss, in this -- in hearing this motion, the Court would not only consider hearsay -- everything they've produced has been hearsay. We've had no opportunity to cross examine these affidavits or anything else. So the Court not only considers hearsay, but would consider unsworn statements in the moving papers as you do with a pleading and a motion to dismiss.

So in here not only do we have sworn statements of Mr. Balanko, who, to be sure, we believe to be self-interested, but what he said with respect to the common ownership between Payment World Moldova and Victoriabank, which is a key, key issue here. What he said is a sworn statement and Mr. Mehta was there. He could have cross examined him on it.

For that matter, Victoriabank could have provided this Court by affidavit or otherwise information on the ownership. If it's not right, if this is not correct, well, then why doesn't Mr. Mehta set us straight about that. Why doesn't he put in an affidavit that says this guy had no ownership or this guy had a small ownership or whatever it is.

But as it stands, it is unrebutted and unrebutted by a party who has every available resource and incentive to provide contrary information to the Court if it existed that the primary shareholder of Victoriabank is the primary shareholder and the founding member of Payment World Moldova.

So that is a key fact and it stands unrebutted and this Court plainly can, should, and must consider it as true for purposes of this preliminary proceeding.

Now, they spent a lot of time talking about the *Reebok* case and the Court has mentioned it, so let me go through that case a little bit with you because they said one thing that is -- factually is not -- is clearly incorrect.

Mr. Mehta speculated that, well, of course, the Luxembourg bank -- it was Banco something something Luxembourg, Bank of Luxembourg. He said, well, they had to have some correspondent bank account. They had to do business in the United States. Well, Judge, the facts of that case, the unique facts of that case were that they didn't. I mean, the Court in the very first paragraph of the opinion says about the bank, "It has no physical presence in California nor does it transact any banking business in the United States." And then that's repeated later in the -- later in the opinion. So that is a fundamental difference in that case than this case.

Now, also in that case, Your Honor, of course there

is no suggestion that there is any common ownership or commonality or anything going on in terms of a joint motivation or between the depositor and the bank. On the contrary, even though the district court made some findings about -- or made some suggestion of, he said collusion. I don't know if that's the right word. But some connection there. Then the Court of Appeals came in and said, no, we're looking at these facts. We find that fact to be clearly erroneous.

So the Court of Appeals determined, essentially, that the bank in Luxembourg, who does -- who had no -- did not -- does not transact business in the United States, did everything that it could do to try to figure out and to balance the TRO from the American court and whatever obligation it might have from Luxembourg.

So here's what it did. First, it didn't give the depositor the money. The depositor came in, asked for the money. The Court said -- I mean, the bank said no. And work out -- essentially told the depositor, look, you need to go get a court order. We're not going to do anything until we have a court order from a Luxembourg court. So they went to the depositor, filed an action in the Luxembourg court. The bank opposed it and then the Luxembourg court said, depositor, you win. Bank, you are required to give the depositor their money. So at that point they give the depositor the money and

then the Court of Appeals says, well, okay, what do you expect the bank to do? They've got -- they've got an order from their own court telling them to do this.

This is not a situation like we have here where a bank with common ownership interest of its majority shareholder with the customer one week after receiving notice, or more, spirits the money away through a New York bank account to some bank in Russia which then later, according to Mr. Balanko, mysteriously fails, okay, and millions of dollars are gone.

All right. This reads more like a spy novel when you get into this than it does some kind of an ordinary course of business transaction which is that the underlying false suggestion of Mr. Mehta that somehow the Court, if it were to allow this case to just proceed, okay. This is a preliminary proceeding for jurisdiction. If it allows the case to proceed, then somehow every bank in the world that has a correspondent bank account would be at risk. That is absolutely untrue.

What we have said, Your Honor, is that it was the use of this correspondent bank account, not just maintaining a correspondent bank account. Yes, they have a correspondent bank account. Yes, hundreds of millions of dollars flow through it. But it is the use of that bank account. And that's what these cases, the Lebanese Bank case, the other

cases that we've cited where with knowledge that they were doing something wrong, a foreign bank used its American account to help its depositor in violation of a court order, okay, or in violation of some other duty that it had. And that's the very different situation that we have here. That was not at all present in *Reebok*. And it doesn't pose any risk except to banks who with knowledge of an order used an American account to intentionally violate the order. Okay.

They have a different -- if, in fact, they had sent this money directly to this bank in Russia or some other place not through the United States, then the argument would be very different. They still would be intentionally violating the Court's order, but they would not have, as is the legal standard, purposely availed themselves of the American account that they held to violate the Court's order.

And let me mention one other thing to you about the routing of the money. You'll notice, I think it may be in a footnote, it may be in the text of their papers, they point out that, well, you know, this account had been used previously to route money for the Payza account that was connected to the receivership. And they said, now, that -- before in the summer of 2012, before the SEC got involved and the receiver was appointed, that money, where did it go? It went to Canada.

Well, Your Honor, it doesn't take much to -- we knew

that they had used the account more than just for this one transaction. We pointed out this one transaction because it was post-order, it was in violation of the order before they had notice of this, before the receivership was even in place. We're not contending they did something wrong by using this, although it was obviously in furtherance of the scheme. It's not subject to the Freeze Order. But what is important is you see that money going to Canada and then as soon as they find out that there's a court order and a receivership, then rather than going to Canada where presumably they figured we'd have a better shot at getting it, then the money starts -- gets routed to Russia. But they still used the United States bank and that's where they tripped up because that's what subjects them to minimum contacts and this Court's -- this Court's jurisdiction.

Now, let me mention quickly the service of process issue. In a contempt proceeding, Your Honor, formal service of process is not required and it can be handled during the course of the litigation according to the Court's order. All that's required is actual notice and opportunity to be heard. Plainly Victoriabank has had all of that and more.

If you think about it, the notion that you could not get -- bring a party in a contempt proceeding before the Court without service of process, it would be a playbook for every fraudster and Ponzi scheme. You put your money overseas and

then if the SEC comes in and shuts you down, well, then, if they got a Freeze Order and you send the Freeze Order there, well, you've got to serve us and so there's a year, and how long do you think the money is going to be there if there's a year of service? If the Court -- if we were to need to in the Court's view in the context of this contempt motion actually serve some papers on the bank in Moldova through the Hague Convention, then the Court can order it and we can do it, but it doesn't -- the case can proceed without any kind of initial service. Otherwise, these cases could never go forward.

THE COURT: How do you get around the notion from Moldova, which appears to be undisputed, that compliance with this Court's order would violate Moldovan law?

MR. BRENNER: Well, Your Honor, again, we've had no -- one, no opportunity to do that. But -- and there are other facts here that might bear on any Moldovan court's decision that aren't addressed in that affidavit. Principally the common ownership and what he refers to as complicity, and that's a good word for it, those facts are not at all evident in that order. And I think there's much to be determined, there are many more facts that need to be discovered and the full factual scenario played out if -- to determine if, in fact, the Moldovan courts would say, well, in the case of a customer with common ownership and a U.S. federal court order, then you can't put the money on hold. That -- I think it's

much too early in the case to make that determination.

THE COURT: You could have domesticated the order from the Court in Moldova, correct?

MR. BRENNER: Well, Your Honor, I don't know the answer to that question to be honest. But I mean -- but the money would have been gone. I mean, as we've seen in the facts, the money was gone a week later. So I mean, to say that you have to domesticate the order is very facile for them because the money was gone a week later. So there would have been no time to do that.

THE COURT: That money was gone. What we've got frozen in New York is not that money, right? Fungible, yes, but it's not that transaction.

MR. BRENNER: Yes, sir, so far as we know.

THE COURT: Okay.

MR. BRENNER: But Your Honor, I don't think that the Court can conclude at this point without all the facts before it and without giving the receiver the opportunity to cross examine, that the issue of this Moldovan law, if it even applied, that we can make that -- make that leap at this point.

And Your Honor, that really -- the question of whether they were bound by it really goes more to the merits of whether it's a violation as opposed to jurisdiction because the jurisdiction would be founded on the minimum contacts of

using the New York court -- I mean the New York bank. And so, I mean, jurisdiction is just the threshold issue. It's not a matter of making a final decision now on whether or not there was -- whether there was a violation or not. Clearly there was a violation. That would be more in the nature of a defense even by them that, yes, we violated your order, but we were entitled to do so based on Moldovan law. Again, that's a defense to the merits, not a -- not a jurisdictional out for them.

Let me mention, if I can, Your Honor, the response to the Section 754 issue. With respect to the application of the Court's jurisdiction in New York, jurisdiction is determined not at the time of the wrong, it's determined as of the time in 2016 when we brought the action directly, brought them into the case and asked the Court to rule on their violation. So long as the Court in 2016 had jurisdiction over that account, then it is -- jurisdiction is appropriate. The jurisdiction again is founded on minimum contacts which has to do with the use of the account to do the -- to do the violation, to violate the order. And then long before 2016, the 754 notices were filed in New York. So we don't believe that that argument should have any bearing on the Court's exercise of jurisdiction.

Your Honor, we don't know why Victoriabank used this U.S. account to route the money. What we do know is that it

matters. And what we do know -- so far as we've been able to determine and for purposes of this proceeding, this preliminary proceeding, there is substantial common ownership. So in other words, you don't just have some independent financial entity. None of these cases talk about this. What we have here is a very unique factual situation that gives the Court the opportunity at this preliminary stage to say, okay, I'm going to preliminarily take jurisdiction of this case. And then ultimately, I mean, on the trial of the merits, we're going to have to show -- you know, prove everything by a preponderance of the evidence. We understand that.

But in terms of the applicable law, in terms of the ownership interest, in terms of the complicity, in terms of all of these things, if you look there's a case, and I don't believe we cited it -- either side cited it in the papers, but it's a Fourth Circuit case and I think it's one that looking back on we probably should have cited. It's *Grayson versus Anderson*. It's at 816 F.3d 262. And it talks about the standard and the notion of preliminary proceedings, and it talks about the better practice is to decide jurisdiction as a preliminary matter with the lower standard akin to a motion to dismiss, particularly where there's any factual issue important to jurisdiction that's also tied up with the merits. And that's really what we have here. The issue of common ownership of Victoriabank and Payment World Moldova is

relevant both to jurisdiction, the merits of the Freeze Order, and probably to the application of any Moldovan banking law.

And so for those reasons, Your Honor, we would ask that the Court at this preliminary stage take jurisdiction of this case and allow it to proceed and we can get discovery of Victoriabank which has so far been denied.

THE COURT: How are you going to do that?

MR. BRENNER: Well, I think if the Court orders them to permit discovery, then --

THE COURT: We're getting right back into do I have the power -- does this Court -- forget me. Does this Court have power to do that?

MR. BRENNER: Well, I mean, I think you order it and then if they refuse to do it, then it could ultimately go to the Court of Appeals, I assume.

THE COURT: Well, all right. Mr. Mehta, do you have any rebuttal? Brief.

MR. MEHTA: Just very brief, Your Honor, on the -- on the last point.

I mean, it is sort of wrapped up. Mr. Brenner says this whole issue of whether you have the power, whether your order has any power and effect in Moldova is a matter for later in the proceeding. But it's not. I mean, they -- they put the whole -- the cart is always before the horse with them. The whole crux of the matter is does your order have

any power and authority in Moldova, particularly given the Moldovan -- undisputed facts before you which are Moldovan law wouldn't allow that order to be implemented the way it was because it was not registered and because in order to freeze a Moldovan bank account, you have to have a court order from Moldova in order to do it, which is exactly the situation that there was in *Reebok*. And in *Reebok*, the defendant in *Reebok* actually did go to court -- or actually *Reebok* did go to court seeking to domesticate its judgment in Luxembourg and the Luxembourg courts refused to domesticate it.

We don't have that here. What we have here is an affidavit from a lawyer in Moldova who says you can domesticate it. You must domesticate it. And unless it's domesticated it has no effect and obeying it would violate Moldovan law.

They have had more than a year to get their own Moldovan lawyer to examine this situation. If they disagree with what Mr. Bivol who filed the affidavit back in April of 2016, if they dispute anything of what he said, they've had plenty of opportunity to bring you contrary evidence. They just haven't done it.

So the state of the record is it would violate Moldovan law. And that's where the question of can -- can we get to some -- beyond the preliminary process just completely fails. In some respects the jurisdictional issues and that

issue do collapse. I agree with Mr. Brenner about that. But that's the core issue. It's always going to be the core issue.

And if you don't have the authority to hold Victoriabank in contempt under the -- under essentially what he says, that they violated your order, then you don't have that power. And whether you call that jurisdiction or whether you call that some kind of a limitation on your power because your power doesn't run to Moldova, it doesn't matter. It ends up in the same place just like seeking discovery would end up in the same place.

Now, there is -- Your Honor is exactly correct, and Mr. Brenner was candid in responding to Your Honor. The money from September of 2012 is gone. Everybody agrees with that. That's the only money that the receiver has identified as being receivership assets. But what Mr. Brenner didn't tell you is that there's other money that also flowed into that account past September of 2012 and flowed out of that account past September of 2012, and had they been -- had they, in fact, domesticated your order in Moldova, done everything properly, given the bank the order from a Moldovan court saying freeze this account, implement your order, there was, I think, more than $10 million that flowed through that account after September of 2012 beginning in -- somewhere in October and running for another almost year, maybe a little over a

year. And those circumstances -- you know, they keep saying money is fungible. Well, had they done what they were supposed to do, they would have at least gotten perhaps $10 million, perhaps more depending on the circumstances of that money tied up. So they don't want -- they want money to be fungible when it suits them, but they don't want money to be fungible when it doesn't suit them and that's just not right and not fair.

Now, Mr. Brenner keeps talking about "they." You know, they went off and routed this money through Bank of New York and so on. Well, who exactly is "they"? If you look at the declaration that they, meaning the receiver, procured from the Bank of New York Mellon, and specifically at paragraph 6 of that declaration, the "they" is the customer. It's always the customer. It's the customer that directs where the money goes. And the banks in between operate within their banking conventions and all of the international treaties and compacts and so forth that allow the money to go. But this money went from Moldova to Russia. It went from Payment World Moldova to Payment World Hong Kong. It went, according to the receiver, from Payment World to Payment World. And that is the state of the record in this case. That's the "they."

He says, well, there's this indication from Mr. Balanko through hearsay of some common ownership between Payment World and Payment World Moldova and...

THE COURT: Victoriabank.

MR. MEHTA: And Victoriabank.

Well, what you said was bring me the evidence. What they brought you is Balanko saying Mr. Platon who I was dealing with told me that he was the majority owner of Payment World Moldova, which according to the receiver Balanko's also involved in, and also a majority shareholder or a major shareholder in Victoriabank. That's not evidence. That's Mr. Balanko saying something that somebody else said. It's rank hearsay. It doesn't substantiate anything.

And the standard here is preponderance of the evidence on that point. I mean, they can try to weasel around it a little bit, but that is still the standard. Given the opportunity and taking the opportunity to take jurisdictional discovery, the standard shifts from prima facie to preponderance of the evidence, and this is not even prima facie. I mean, you can't come in here and say, oh, the guy that I think is a liar is -- told me that somebody else told him that there's common ownership here. That doesn't even pass any kind of a smell test when you look at what the *Unspam* case, the Fourth Circuit case says in terms of what you need to allege in order to allege a conspiracy between banks in that case who appear to be operating in the normal course of business in the Visa payment scheme. In our case, of course, it's the normal course of business in a correspondent banking

payment scheme.

He says -- he says, and I agree with him, this reads like a spy novel. It does read like a spy novel because it's a work of fiction on the part of the receiver. It's not real. And that's why it reads like a spy novel.

And he says that in the *Reebok* case, the Court in the first opening paragraph said words to this effect: The Luxembourg bank had no physical presence in California, nor does it transact any business in the United States. But Victoriabank is exactly the same way. It has no physical presence in the United States, North Carolina or anywhere else in the United States, nor does it transact any business in the United States. It has a correspondent bank account in New York. The correspondent bank account in New York is not transaction -- transacting business by the bank in the United States because a correspondent bank account -- go back to paragraph 6 of the Bank of New York Mellon declaration. A correspondent bank account exists for the purpose of allowing a customer, in this case Payment World Moldova, of a foreign bank, in this case Victoriabank, to transact business in international commerce. And this particular business was money flowing from Moldova to Russia, or, in the case of the earlier transactions that Mr. Brenner talked about, money flowing from Moldova to Canada.

These are not transacting business in the United

States and that's what the *Daventree* and the general rule line of cases on correspondent banking hold. Just having a correspondent banking account and having it run transactions that are dollar denominated and therefore run through U.S. banks is not transacting business for purposes of the long-arm statute or for purposes of due process, for that matter, because we're talking about minimum contacts, transacting business in the United States.

Thank you, Your Honor.

THE COURT: Thank you, counsel.

MR. BELL: Your Honor, may I respond?

THE COURT: You may.

MR. BELL: And I rise to address some of this because obviously I'm the one who did a lot of things -- or didn't do some of the things that have been suggested I should have done.

Obviously, I think we're right on the law or I wouldn't have allowed Mr. Brenner to file this pleading and make the argument.

But separate and apart from that, I think about what actually happened here and the practical effect of the success of Victoriabank's argument if it were to succeed. The playbook would certainly be drawn because what happened here as far as we know on the information available to us and to the Court is that Payza entered into a contract with this

company Payment World, the U.S. company, which then set up these sort of affiliates, if you will, with Payment World Hong Kong to handle its international business. And then Payment World Hong Kong is complicit in, if you will, the creation of Payment World Moldova for the sole purpose of processing these funds. And lo and behold, apparently unrefuted so far, the founder of Payment World Moldova is a large shareholder, maybe the largest shareholder of Victoriabank.

Now, it's been argued that the only way we know that is rank hearsay. Well, actually, that's not even true to the extent that Mr. Balanko quotes this Mr. Platon who is the supposed shareholder. That would be a party admission. But I don't want to run down that rabbit hole. We did -- no one has mentioned yet, we did give to the Court news articles that reported that Mr. Platon was a large shareholder, maybe the majority shareholder in Victoriabank. So we're not just guessing here and we're not just going off of what Mr. Balanko said.

And then -- so in the early part of 2012 receivership, so we're talking between August 17th and September 25th, what apparently we should have done is go to Moldova and domesticate this Court's order. Now, I did consult with Moldovan counsel and was told you can't do it. It can't be done. And if you want to try, we can charge you some money and we'll try and it will take years, but we can

try. So there was no effective way to do it.

Now, even after that, the money -- that account, the Payment World account at Victoriabank, by their own statements of records, that money is gone by December '12 and the accounts are closed. So even if we had moved at lightening speed under the Hague Convention or any of the efforts to go through Moldovan counsel and get it domesticated, there was essentially no money left in that account. I guess they weren't closed. I think there was like $12 left in it or something. But anyway, there's no money there by December 2012. There is no way we could have done what we're being told is the easy way to do it that would have been effective.

And to make matters worse, so a week after they get the actual notice from us in written form and notice to the president, according to the sworn testimony of Mr. Balanko, that this Court's order is for Victoriabank not to do that, 12 days later, or something like that, the money moves out of that account, not to Canada anymore and into the accounts of Payza, but all of a sudden to Russia. As an insult to injury, they do it through a New York bank, Bank of New York Mellon. Didn't have to do it that way. And they're saying that doesn't matter either. That we come through the United States to facilitate this transfer of money at a time we knew that it reflected receivership assets, or may have at least, and that

a court in the United States had ordered that we not do that, that we not move that money.

And to complete the story, I can't remember now if it's the end of 2012 or early 2013, again, according to news reports and the information we have coming from Mr. Balanko, I think, Mr. Korkin, who, if the Court will recall, is Payment World Hong Kong, becomes a large, if not the largest shareholder of Victoriabank.

So all we're asking for at this point -- and Mr. Mehta keeps saying we have now completed jurisdictional discovery. We have not. We have not been permitted to obtain any discovery from Victoriabank. We did talk to them right after this Court's instructions last June. Can you give us some information? Can we engage in informal discovery? What are you willing to do with us to flesh out some of these facts? Nothing. They participated in jurisdictional discovery. They participated in Mr. Balanko's deposition, for instance. But we haven't finished all that can be done to establish jurisdiction.

Now, I think this Court has jurisdiction under the law that we've cited, most prominently because of the finger-in-the-eye use of that correspondent account in New York to facilitate the moving of this money. I don't know -- it certainly would have been a different argument and maybe a losing argument if they had done it some other way, but they

cannot avail themselves of a New York bank to move funds that are under order from this Court to be frozen and then say, Your Honor, there's nothing you can do about it.

And so again, in addition to the law where I think we're right, the practical effect of this is that the playbook will be written. It will be employed immediately in every scam that's going on and every future scam. Here's how you do it to get beyond the reach of a U.S. court. In fact, if you want to move the money after a court order, if you want to, go ahead and use a U.S. correspondent bank account because that won't hurt you either. And that precedential effect worries me.

THE COURT: Nobody else has said anything like that.

All right. I'm going to take about a ten minute recess --

MR. MEHTA: Can I just respond very briefly?

THE COURT: Five.

MR. MEHTA: Oh, less.

Number one, Your Honor, Mr. Bell says it's not just Balanko, it's news articles. News articles are just as much hearsay as Balanko saying Platon told me something. We all know that.

Number two, he says I did consult with Moldovan counsel and they said you can't do it. Well, where's the affidavit from Moldovan counsel that says you can't do it?

There's nothing like that here. There's nothing in the record before you from a Moldovan law expert except for Mr. Bivol who says you gotta do it. And if he can do that, I can do it too. I've talked to Mr. Bivol. He said, I've done it. It takes about 30 days max. So you know, I'm an officer of the court just as much as Mr. Bell is.

Now, Mr. Bell says the playbook will have been drawn. Well, maybe so, but the playbook depends upon there being a bad actor in the position of Victoriabank and there is nothing beyond hearsay that puts Victoriabank in a bad actor spot and that's just not enough. It's not substantiation enough which is what you asked him to produce almost a year ago.

And if he thinks the playbook has been drawn, it has been anyway because if you do issue essentially a contempt since they've essentially decided already that Victoriabank violated your order, then everybody will use a correspondent bank not in the United States. Deutsche Bank in Germany can handle dollar transactions just as well as BNY Mellon in New York. So the playbook will have been drawn in that sense.

What they are saying, Your Honor, truly is if you use a correspondent bank account in the United States, you are within the reach of the contempt power of every federal district court in the United States even if you never set foot upon or transact any business in the United States, and that

is just flat wrong under due process.

THE COURT: All right. I'm going to take a brief recess and come back. I think I'll be ready to give a bench ruling.

(Brief recess at 3:10 p.m.)

(Court back in session at 3:20 p.m.)

THE COURT: I am ready to rule on the motions from Victoriabank.

At the previous hearing, the Court announced it would hold this motion in abeyance and allow the receiver to take limited jurisdictional discovery. It appears that such discovery was indeed conducted and the receiver has filed a supplemental brief at the Court's direction, as has counsel for Victoriabank. I've read the supplemental briefs, heard arguments of counsel and I am now prepared to make a ruling on Victoriabank's Motion to Dismiss the Receiver's Motion for an Order Directing Victoriabank to Turn Over Receivership Assets and/or Find Them in Contempt.

Because the receiver was allowed by the Court to conduct jurisdictional discovery as to the issue of personal jurisdiction, the burden on the receiver to establish this Court's jurisdiction over Victoriabank is by a preponderance of the evidence. See *Estate of Thompson v. Mission Essential Personnel, LLC*, 214 U.S. District LEXIS 133315 at 4-5 (Middle District of North Carolina September 23rd, 2014).

After reviewing the evidence submitted by the receiver, including the deposition of Mr. Balanko, and the declaration of Mr. Wildner, the Court concludes the receiver has failed to show by a preponderance of the evidence that Victoriabank is subject to personal jurisdiction.

The Court must disagree with the receiver's theory that maintaining and using the correspondent banking account in New York can give rise to specific personal jurisdiction over a foreign bank. The cases cited by the receiver in support of his argument are distinguishable. I find the case of *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316 (New York November 22nd, 2016), to be persuasive. The *Rushaid* court required the foreign bank's active participation in the scheme in order to permit jurisdiction over the foreign bank under the New York long-arm statute. First of all, the receiver has not established that Victoriabank actively participated in any scheme to fraudulently divert receivership assets. The transfer of funds at issue was initiated and directed by the originating customer, Payment World Moldova. And any relationship between Victoriabank and Payment World Moldova, Payment World USA, and Payment World Hong Kong is murky at best and based upon hearsay.

The receiver's next argument, that violation of the Freeze Order itself confers jurisdiction, is likewise untenable. It is undisputed that Victoriabank has never been

properly served with process in compliance with the Hague Service Convention. The 2012 Freeze Order was never served on Victoriabank through Moldovan Central Authority with the documents translated into Romanian. The receiver has only sent informal correspondence to Victoriabank in English. Because the receiver never complied with Moldovan law in order to render the 2012 Freeze Order enforceable in Moldova, Victoriabank was not required to comply with the order and certainly cannot be held in contempt for failure to do so.

Moreover, Victoriabank has submitted an undisputed affidavit from Moldovan counsel that establishes that its compliance with the 2012 Freeze Order would have actually violated Moldovan law. The Court finds the Ninth Circuit case of *Reebok International v. McLaughlin*, 49 F.3d 1387 (9th Circuit 1995), persuasive in its holding on a nearly identical fact pattern. Accordingly, the Court finds that it cannot hold Victoriabank, a foreign nonparty bank, in contempt for failing to comply with an injunction that was not enforceable in Moldova, particularly where the bank's compliance with the unenforceable order would have violated the laws of Moldova.

The receiver's reliance on *SEC v. Homa*, 514 F.3d 661 (7th Circuit 2008), is misplaced. First of all, *Homa* involved the Court exercising personal jurisdiction over U.S. citizens living abroad, not a foreign entity. Moreover, the Second Circuit noted in the *Gucci v. Bank of China*, 768 F.3d 122 (2nd

Circuit 2014), that no court has ever extended the holding in *Homa* to a foreign nonparty that is not a citizen of the U.S, see page 137. The lone case of *Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Insurance Company*, 216 U.S. District LEXIS 95707 (Eastern District of Pennsylvania July 22nd, 2016), is of no help to the receiver because of its unique set of facts not at issue in this case, principally because the foreign entity came and filed suit in the United States thus choosing the jurisdiction of the Court.

Because the Court finds that it has no personal jurisdiction over Victoriabank, the Freeze Order of February 12th freezing Victoriabank's account at the Bank of New York Mellon must be dissolved, and Victoriabank's Motion to Dismiss is granted.

However, in view of the facts in this case and the murkiness of some of it, I will put in abeyance for a period of 30 days the effect of this opinion giving the receiver that amount of time in which to file an appeal should you desire to do so, and would recommend to the Fourth Circuit if you decide to do so that an expedited appeal occur. And I will be happy to recommend that to the Court of Appeals if that's the way you guys decide to go. But if you don't proceed to do that within the 30 days, the order is going to be entered. The money is going to be cut loose.

And I thank you for a banking case that reads like a

John le Carre novel. Thank you very much.

MR. BELL: Thank you, Your Honor.

MR. MEHTA: Thank you, Your Honor.

(End of proceedings at 3:27 p.m.)

*****

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NORTH CAROLINA
CERTIFICATE OF REPORTER

I, Cheryl A. Nuccio, Federal Official Realtime Court Reporter, in and for the United States District Court for the Western District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 8th day of May 2017.

s/Cheryl A. Nuccio
Cheryl A. Nuccio, RMR-CRR
Official Court Reporter